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IN THE

Supreme Court of the United States

October Term, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. of L., and JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF FOR LOCAL 74 AND JACK HENDERSON, PETITIONERS

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POINT I

Since the Board heretofore conceded that this case "poses the question" whether the Local's withdrawal of its members "because" Stanley injected non-union labor, was a violation of Section 8 (b) (4) (A) of the Act, we are surprised by the Board's brief which apparently now argues that such question is not posed, and that the withdrawal was "because" of another object.

In its Supplemental Memorandum withdrawing its opposition to certiorari herein, the Board said (p. 1):

> "The Petition for a Writ of Certiorari in this case, like the petition in No. 108, this Term, *poses the*

> *question* whether the action of a union in calling a strike of its members employed on a construction job, *because* the owner thereof engaged the services of a subcontractor who employed non-union labor on the project, violates Section 8(b)(4)(A) of the Act. For the reason stated in the Government's Memorandum in No. 108, which is being filed concurrently herewith, *we believe that this question now warrants review by this Court*, and we accordingly withdraw our opposition to certiorari with respect to this issue." (Italics ours.)

Turning, accordingly, to the Government's Memorandum in No. 108, we find formulation of a like question; and the statement that such question has been differently decided by Courts of Appeal, and hence (p. 2):

> "Because of the conflict and *the importance of the question* in the administration of the Act, the Government intends to petition for a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit in the *Denver* case." (Italics ours.)

The Board's current brief in the present case causes us surprise in that seemingly it does not argue "the question" which, the Board heretofore said, the case "poses", but shunts it aside by contending that the withdrawal was "because" of another object.

Thus, the gravamen of the Board's present brief seems to be the following contention (p. 17):

> "In these circumstances the fact that the strike was called and continued in effect pursuant to petitioner union's rules which prohibit union members from working on a job when non-members are employed (R. 105, 123, 130-131, 134), cannot disguise the

fact that *an* object of the strike was to force Stanley to cease doing business with Watson."

If all that is really involved in this case is a question of fact as to "*an* object," we fail to understand the Board's recommendation to this Court that certiorari be granted.

Our position is that the Board was right in its aforesaid Supplemental Memorandum that this case "poses the question" of law therein formulated as of "importance in the administration of the Act."

POINT II

"The question" which, as stated in the Board's Supplemental Memorandum, this case "poses", is inherent in the findings.

Thus, the Board's Decision in this case stated as the conceded fact (R. 54):

> "It is conceded that on August 21, 1947, the day before Section 8(b)(4)(A) became effective, the Union's business representative, Henderson, ordered the carpenters to cease work at the Stanley residence *because* Watson's non-union employees were also performing work on the job, and that thereafter, pursuant to said order, which was never rescinded, and at all times material remained effective, the carpenters refused to work on the job." (Italics ours.)

The same "because" appears in other findings. For example (R. 27; 51):

> "There was no attempt to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—*simply a concerted*

refusal to continue working with the non-union workers, in accordance with long established union precedent." (Italics ours.)

For further example (R. 21; 51; 131-3):

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union members were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

Indeed, the Board's Main Brief in support of its former opposition to certiorari herein conceded (p. 8):

> "Henderson gave the order *in accordance with* a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed." (Italics ours.)

If these findings mean what they say, then it seems to us that in its aforesaid Supplemental Memorandum the Board was right in formulating "the question" which it asserted that this case "poses," and in defining the "because" of the withdrawal.

POINT III

There is not a particle of evidence in this case that the Local would have permitted a violation of its own working rules and "long established union precedent", if Stanley had injected on the job non-union men employed by himself or from any other source whatever.

Everyone testified that *before* Stanley made any contract at all with Watson's he was fully warned and knew of the working rules of the union whose members had been employed to do the job; and that he knew that laying wall and floor coverings was within the crafts jurisdiction of the Local, whose members were competent and experienced for such work.

For example, Stanley himself testified on direct examination (R. 92):

> "Before I went to Watson's he (Parker) said that 'The Union men are not going to work with their men; there'll be trouble.'
>
> "Q. Did he tell you at that time his men—his carpenters were members of the Respondent Union?
>
> "A. He did."

Stanley also had knowledge in advance that Watson's employees were non-union men. Thus, Stanley testified (R. 105) that "Mr. Parker told me they (Watson's men) were non-union and it seems to be a general knowledge that they were non-union. * * *" Stanley testified that Parker told him this "when we first started looking for material" (R. 105).

Parker testified that when Stanley suggested that they go to Watson's store to look at material (R. 139):

> "* * * I told him, I said, 'Mr. Stanley,' I said, 'Watson's works non-union men,' and I said, 'My men can-

not and will not work, according to trade rules of the Union, will not work with non-union men * * * .' "

It was for this reason, says Watson's store manager, that Stanley first tried to induce Watson's to sell him the material *separately*, so that it could be installed by the Local's members (86).

POINT IV

Under the contract between Parker and Stanley, Parker was to furnish the material and the workmen to complete the job.

In its Opinion the court below correctly stated that early in August 1947 Stanley "contracted with D. R. Parker to improve and renovate the house" (R. 188); and that (R. 188)

> "The contract provided that Parker should furnish the material and sufficient workmen to complete the job not later than August 15, 1947."

The contract is dated August 4, 1947. It specifically provided that Parker agrees (R. 184)

> "to furnish a sufficient number of men on the job and material and to diligently pursue the work continually until it is fully completed."

Under this contract, Parker had the sole right to hire and fire; and he hired only union men on an at will basis. They were "free to quit at any minute or any hour * * * that's their privilege" (R. 138-9).

As the court below said in its Opinion (p. 189):

> "All workmen hired by Parker were union members, including carpenters who were members of Local 74."

POINT V

The Board's brief is, we submit, in error in its claim that the employment, as Parker and Stanley set it up, was not an employment under all-union working conditions, and was not subject to the rules of the Union, and, as between Parker or Stanley on the one side and the Union on the other, did not represent collective bargaining.

(1) The working rules of the Union represent and constitute the union side of any employment of its members. They represent a standing collective bargain as to the terms upon which employers must employ its members.

In the present instance the Examiner found and the Board confirmed (R. 18, 51):

> "Parker was a member of Local 74, and all the workmen, besides the carpenters, employed by him on the job were union men."

The Examiner stated that he "assumed that Stanley was the actual employer" (R. 18); but the Board stated that "it is immaterial for purposes of this decision whether the carpenters were employees of Stanley or of Parker" (R. 54).

In either event, here was a contract made with a union contractor (himself a member of Local 74) who invariably employed, and, by reason of his own union membership, could employ, only union men. Stanley himself has admitted that "it was my understanding with Parker that union men were going to do the work," and that he knew they had been and were so employed for the purpose (R. 92, 96).

Stanley also admitted that Parker was the "general contractor," and that it "was his job to hire them (the men) and supervise the work" (R. 101).

Under these circumstances, the union working conditions and working rules became part of the employment, for they were part of the terms of the collective bargain upon which union members, among whom Parker himself was one, could be employed.

(2) The Board's brief states (p. 19) that our claim that Stanley and Parker had an understanding for the employment of union men "is an obvious afterthought".

The Board is mistaken. In our brief in the Court of Appeals we argued at length (p. 58) that "the job had been started by Stanley himself as an exclusively union employment," and that "subsequently, by sending in Watson's non-union men, Stanley attempted to force upon the Union and its members new, adverse and non-union working conditions" (p. 58).

This contention on our part was necessarily involved in our exceptions to the Examiner's "Failures or Refusal to Find" (R. 42, 43).

(3) The Board's brief also asserts that we rest our "position entirely upon a truncated excerpt from Stanley's testimony, which omits the critical qualification which Stanley added" (p. 19).

Respectfully, we cannot agree. In the first place, by this portion of Stanley's testimony (R. 96) it is entirely plain (and, so far as we can see, undisputed,) that Stanley knew that Parker was a union contractor and member; and also that Stanley knew that Parker accordingly had, as the Examiner found (R. 18) and as Parker testified (R. 138), employed only union men.

In the second place, Stanley himself testified that he "always enjoyed having Union men working, preferred them"; and that "it was my understanding with Parker that Union men were going to do the work" (R. 96).

We do not see how these two statements and admissions by Stanley can possibly be interpreted otherwise

than as referring to the time when he made the contract with Parker. Certainly this "understanding with Parker" could not have been at any other time, for he could not have had such "understanding" with Parker when he signed the contract with Watson's for installation by non-union men, and he could not have had such an "understanding" with Parker on August 21 when Watson's non-union men had already begun to do their work.

As to the rest of Stanley's accompanying testimony, to wit, "and that I certainly didn't mind having Union men do it if I could possibly find material for my floor covering and walls" (R. 96), that testimony, as we have always construed it, was not a "qualification" made at the time of his contracting with Parker, but rather was an affirmation that if he, instead of Parker, could find material for the floor and wall covering he was willing to have Parker's union men install it. If it was a "qualification" at all, it was simply a qualification of Parker's contractual right "to furnish" the material (R. 184). According to the terms of the written contract with Parker and the finding of the Examiner (R. 17):

> "Under the terms of the agreement Parker was to furnish and supervise necessary workmen and to select material needed for the improvements."

The Examiner correctly found that installation of this character was within the crafts jurisdiction of Local 74 which had members competent and experienced for doing it (R. 15; 19 footnote 15).

Stanley's contract with Parker contained no reservation of any right on the part of Stanley to engage another contractor, or to have the men of such other contractor do any portion of the work, or to employ union or non-union men himself. It was Parker's right and obligation, through men furnished by himself,

> "to diligently pursue the work continually until it is fully completed" (R. 184).

There was not a word in the contract which preserved or reserved to Stanley (as contended in the Board's brief, p. 20) the right to "be free to use non-union sources"; and, even if there had been, Stanley could not thereby require Local 74 or its members to recognize or acquiesce in his subsequent breaking down of their working conditions which, up to the moment when he injected non-union men, had, as the Examiner found (R. 18), been exclusively union.

(4) Whether or not, as the Board contends (p. 20), after his repeated warnings and protests to Stanley, Parker acquiesced in Stanley's decision to send in non-union men in defiance of the Union's working rules, any such acquiescence could not adversely affect or diminish in any way the right of the Union and its members to stand by the union working conditions under which they had been employed up to that point, or to honor and observe their working rules.

Indeed, the Board's own brief puts *the nub of the controversy* precisely when it says (p. 21):

> "And Parker testified that the nub of his 'controversy' with Stanley was that his union men, presumably because of their union rule, would not work with Watson's non-union workmen (R. 142-3)."

Since this was the "nub of his controversy" which Parker had with Stanley before Stanley had elected to challenge the Union and its working conditions and rules, how can it be claimed not to be *"the nub of the controversy"* which the Union had with Stanley after Stanley elected, with profanity, to ally himself with Watson's in the matter of installation and to launch an offensive (R. 140)?

(5) Parker's so-called "acquiescence" was in reality nothing but the following attitude as described by himself (R. 140-1):

> "I told George, Mr. Stanley at the time, I said, 'George,' I say, 'You've stuck your neck out.' I said, 'These men absolutely will not work with non-union men and I've told you,' and I says, *'I'm not responsible for the job* when the (Watson's) men come on the job.' "

Parker testified that he and his union men would have installed Watson's materials as "in other cases" (R. 141); but that, when Stanley contracted for non-union installation, he told Stanley (R. 142):

> "I've advised you of what would happen on the job; *now you've gone contrary to our contract* and it's your baby."

POINT VI

Finally, the Board's brief contends that "an object of the strike was to force Stanley to cease doing business with Watson's", and that in consequence it violated Section 8 (b) (4) (A), irrespective of the compulsory obligation of the Local's working rules, and irrespective of the provocative act of Watson's and Stanley in injecting non-union men into the Union employment, and irrespective of the finding that the withdrawal was "simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent" (R. 27; 51).

(1) At page 17, the Board's brief says:

> "In these circumstances the fact that the strike was called and continued in effect pursuant to petitioner union's rules which prohibit union members from working on a job when non-members are employed (R. 105, 123, 130-131, 134), cannot disguise the fact that *an* object of the strike was to force Stanley to cease doing business with Watson."

We believe that we have fully answered this contention in Points II and III of our main brief (pp. 33-38, 39-42).

The contention overlooks the order of events and the source and cause of the withdrawal from Stanley's residence.

The evidence shows conclusively that, shortly after Stanley made his contract with Parker, Parker's union employees undertook the work at Stanley's residence and continued to perform it satisfactorily (R. 103). There is not a particle of evidence that they would not have completed the work satisfactorily, or that they would not have

competently installed Watson's materials if delivered to them for installation, as they had done on other occasions (R. 133, 141)?

The nub and source of the controversy that developed at Stanley's residence was not Stanley's purchase of materials at Watson's, but the unit, lump-sum contract which Stanley made, at the insistence of Watson's (R. 18), covering both materials and installation. Thereby Stanley took a portion of the work out of the hands of Parker as the general contractor (R. 101), and turned it over to Watson's as a new contractor operating with non-union men. That was an act of provocation. It was a knowing subversion of the union working conditions and rules, as well as of Parker's contractual right, admitted by Stanley himself (R. 101), to do the hiring.

Stanley and Watson's thereby aligned themselves to take over with non-union men; and Watson's was glad of an opportunity to forge a weapon to strike at the Union (R. 139, 140). As long as that alliance existed and continued in operation, the Local and its members could not be guilty of the breach of any law in quietly and peaceably withdrawing.

(2) Assuming, for the sake of argument, the correctness of the finding below that Henderson told Stanley that as long as there stood the unit contract with Watson's covering jointly materials and labor, the Local's members could not stay and would not return, *Henderson was entirely right.* He was merely performing his duty. *He was merely recognizing a fact which Stanley's own act had created.*

Stanley could not have it both ways. He could not have the job done by both union men and by non-union men. As long as he stood by his contract with Watson's to have the job done by non-union men, the union men would not participate further. (See our main brief, pp. 33-42).

The success of Watson's in bringing Stanley into an alliance with it against the union working conditions and working rules at Stanley's job, could not deprive the Local and its members from the right to act defensively, and to say to Stanley that, since he stood by such alliance, they could not stay on the job and thus be forced into furthering *Watson's objects* and their own subversion.

(3) No one testified, and there is not a particle of evidence, that any one told Stanley that the Local's members would not themselves lay Watson's materials. On the contrary, he was told by Parker and Henderson that they would, and that the only objection was to the injection of non-union men (139, 140-1, 123-4). Stanley understood this; and, for that reason, he sought unsuccessfully to have Watson's sell him the materials without installation by Watson's non-union employees (R. 86).

No one testified, and there is not a particle of evidence, that the Local or its members had ever refused, or had ever threatened to refuse, to lay materials *bought by any one from Watson's.* On the contrary, both Parker and Henderson testified without contradiction that they had done so and were willing to continue to do so (R. 133, 141).

No one testified, and there is not a particle of evidence, that the Local or its members were boycotting Watson's materials as such, or that any one told Stanley that they were.

Henderson testified (R. 124):

> "Q. Did you state to anybody that you had in mind the purpose of boycotting Watson's goods or their jobs?
>
> A. No, sir.
>
> Q. Did you have that purpose in mind when you took your men off the job?
>
> A. No, sir; we taken them off because we will not work with non-union men."

(4) The fact that in August, 1947, the Local was peacefully maintaining a single picket in front of Watson's store, carrying a placard communicating to the public the truthful statement that "this store employs non-union labor" (R. 16), in no way affects the legal issue here.

Both the Examiner and the Board held that this orderly picketing was entirely lawful (R. 21-25, 58, 59). The picket was withdrawn on August 28, 1947 (R. 16).

There is not a particle of evidence that the Local or its members refused, or threatened to refuse, to work for any one who had bought, or might buy, materials from Watson's, or that they had ever picketed any customers of Watson's.

Indeed, the Board's own brief now concedes (p. 18):

> "Parker's employees did not cease work as an incidental consequence of picketing directed solely at Watson's employees."

Respectfully submitted,

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